WASHINGTON
LEGISLATIVE OFFICE

August 7, 2012

VIA EMAIL and FAX

The Honorable James M. Cole
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: *Request for Immediate Guidance for Managing Cases Impacted by United States v. Simmons*

Dear Mr. Cole:

On behalf of the American Civil Liberties Union (ACLU) and the ACLU of North Carolina Legal Foundation (ACLU-NCLF), we write to ask the Department of Justice to take immediate steps to identify and assist all federal inmates whose convictions or sentences were undermined by the Fourth Circuit's decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc).

Under *Simmons*, thousands of federal inmates who were prosecuted in North Carolina are either innocent of the federal crimes for which they were convicted or ineligible for the federal sentencing enhancements with which they were saddled. The U.S. Attorney's Offices in North Carolina are aware of this, and have acknowledged it in court filings. Yet, rather than seek to identify and assist the affected inmates, those offices have affirmatively resisted appropriate relief.

On June 14, 2012, *USA Today* published a front-page story explaining that, although *Simmons* was decided in August 2011, dozens of innocent people are languishing in federal prison. But that front-page news has yet to yield a change of direction by the government. To our knowledge, since the *USA Today* article was published, the government has not changed a single thing about its approach to inmates whose convictions or sentences are implicated by *Simmons*.

This ongoing injustice has to stop. For the reasons stated below, the Department should take immediate steps to identify and secure relief for inmates whose convictions and sentences are infirm under *Simmons*.

Background

On June 14, 2012, *USA Today* published an article detailing the story of Terrell McCullum, a North Carolina man serving a federal sentence for a gun charge.[1] By itself, this would be unremarkable. Gun cases make up a large portion of federal dockets, and thousands currently serve federal sentences for gun offenses committed in North Carolina.

What is different about McCullum's case is that everyone agrees he did not commit a federal crime. Though convicted of being a felon in possession of a firearm, McCullum's possession of a firearm occurred when he was *not* a felon under federal law.

The federal felon-in-possession statute makes it a crime to possess a firearm for anyone who has been previously convicted of "a crime punishable by imprisonment for a term exceeding one year."[2] McCullum possessed firearms after sustaining a conviction in North Carolina. Under North Carolina law, the statutory maximum sentence for that conviction hinged on his crime and criminal history. Because his criminal history was insufficiently severe, McCullum's North Carolina crime was punishable by no more than 10 months in prison. Thus, his subsequent firearm possession did not violate the federal felon-in-possession statute.[3]

Convictions like McCullum's occurred because, until August 2011, the Fourth Circuit had held that people like McCullum were felons—even though their North Carolina crimes were not in fact punishable by imprisonment for more than one year—because "an imagined worst-case offender" could have been sentenced to more than a year in prison for the same crime.[4] The Fourth Circuit fortunately rectified this error last year in *United States v. Simmons*, holding that only people who faced more than a year in prison for their crimes qualified as felons. Accordingly, it is now clear that McCullum's felony-in-possession conviction is a mistake.

It is equally clear that McCullum is not alone. Many federal inmates with prior North Carolina convictions—*USA Today* identified more than 60 of them—were unjustly convicted under the federal felon-in-possession statute. Many other federal inmates with prior North Carolina convictions were unjustly *sentenced* under federal provisions that, like the felon-in-possession statute, turn on whether the defendant has a prior conviction for a crime punishable by more than a year of imprisonment. In many cases, the unjust sentences are lengthy due to mandatory minimums or "career offender" guidelines enhancements.[5]

A preliminary review conducted by the ACLU-NCLF, including conversations with attorneys representing clients eligible for *Simmons* relief in each of the state's three federal judicial districts, starts to bring the scope of the problem into focus. More than 3,000 prisoners are potentially innocent or entitled to sentencing reductions pursuant to *Simmons*. And, at last count, the Fourth Circuit had issued 124 decisions citing to *Simmons* since it was decided on August 27,

---

[1] *See* Brad Heath, *Locked Up But Innocent*, USATODAY, June 14, 2012, http://www.usatoday.com/news/nation/story/2012-06-13/innocent-incarcerated-prisoners/55585176/1.
[2] 18 U.S.C. § 922(g)(1).
[3] *See* 18 U.S.C. § 922(g)(1).
[4] *United States v. Simmons*, 649 F.3d 237, 249 (4th Cir. 2011) (en banc).
[5] *See* 18 U.S.C. § 924(e) (2012); 21 U.S.C. §§ 841, 802(44) (2012); USSG 4B1.1, 4B1.2 (2011).

2011, a staggering number for such a short time span and evidence of the decision's broad impact.[6]

Yet the precise number of inmates whose convictions or sentences are implicated by *Simmons* remains unknown.

The Government's Role

Why is the scope of the problem still unclear nearly a year after the *Simmons* decision? Because the government has not yet identified and contact individuals entitled to *Simmons* relief.[7] That failure is crucial because, by virtue of prosecuting all the inmates affected by *Simmons*, the government is in the best position to identify them. In contrast, the federal community defender for the Western District of North Carolina has not even received requested Presentence Investigation Reports and Statements of Reasons. Without these reports, the community defender cannot undertake its own comprehensive review to identify inmates from that district whose convictions or sentences are impacted by *Simmons*.

Worse yet, when the government has been informed of inmates whose convictions or sentences are impacted by *Simmons*, its stance has been affirmatively hostile to relief. Based on our preliminary review, it appears that the government has agreed to relief only for inmates against whom it can assert no defenses—*i.e.*, inmates whose direct appeals were not final when *Simmons* was decided, or inmates who filed motions to vacate under 28 U.S.C. § 2255(f)(1) after *Simmons* was decided *and* within one year of when their convictions became final.[8]

But for the vast majority of inmates affected by *Simmons*—*i.e.*, inmates whose cases became final more than a year before *Simmons* was decided—the government has opposed relief.

---

[6] While it is possible that not all of these citations reference an actual innocence or sentencing issue, it is only logical that the vast majority of these appeals feature these issues.

[7] Some district courts have taken preliminary steps to determine who is eligible for relief and assigned counsel; however, there is no district in the state in which these efforts have been sufficient. For example, the Chief Judge for the United States Eastern District of North Carolina, James C. Dever III, promulgated a Standing Order that, commendably, creates mechanisms for identifying those impacted by *Simmons* and working towards appropriate relief. But the Standing Order is imperfect; it does not provide for attorneys serving on the Criminal Justice Act panel to receive payment for reviewing their files, potentially undermining the effectiveness of their review. Judges in the Eastern District also cannot order the government to work proactively towards realizing *Simmons* relief for all impacted defendants. *See, e.g.*, *Woodard v. United States*, No. 5:12-cv-00106-BO (E.D.N.C. April 27, 2012, July 2, 2012). *Woodard* highlights the challenges posed and the inefficiencies resulting from the government's current obstructionist posture. *Id.* On April 25, 2012, United States Eastern District of North Carolina Judge Terence W. Boyle granted Defendant's Motion to Vacate. *Id.* at April 25, 2012. The government filed a Motion for Reconsideration, necessitating a response from the defendant's counsel. *Id.* at April 27, 2012, May 3, 2012, May 7, 2012. Judge Boyle denied the Motion for Reconsideration on May 18, 2012. *Id.* at May 18, 2012. The government then filed a ***second*** Motion for Reconsideration on July 2, 2012, requiring another response from defendant's counsel. *Id.* at July 2, 2012, July 3, 2012.

[8] Federal inmates may file motions for post-conviction relief within a year after their convictions become final. *See* 28 U.S.C. § 2255(f)(1) (2006). But because the Fourth Circuit held many cases in abeyance while *Simmons* was pending—and thus few cases raising *Simmons* issues became final in the year before *Simmons* was decided—the number of people who have filed *Simmons*-related motions under § 2255(f)(1) after *Simmons* was decided appears to be vanishingly small. We have identified only one such person. *See* Order and Recommendation, *Sheets v. United States*, No. 1:08-cr-00418-WO (M.D.N.C. Aug. 1, 2012).

Instead of taking proactive steps to ensure the innocent are freed, it has thrown up roadblocks. For example, it has claimed *Simmons* does not renew the statutory period for filing a motion to vacate under § 2255. It has also availed itself of affirmative defenses including claiming wrongly incarcerated individuals waived their right to appeal in their plea agreements, defaulted on their right to appeal, or appealed too late. It is difficult to imagine a more bitter irony than arguing a man waived his right to appeal a conviction for an offense he actually did not commit.

The government does not deny that any of these inmates were unjustly convicted or sentenced. For example, while acknowledging in court filings that McCullum can claim to be "legally innocent of the charge against him," the government opposed his release.[9]

This obstruction of justice is the norm, not the exception. In fact, we are unaware of any case in which the government has waived an available defense to post-conviction relief.

Next Steps

The government's unfortunate and unnecessary track record of procedural impediments has created a critical need for immediate guidance from the Department of Justice. *Simmons* was decided on August 17, 2011, nearly a year ago. One of the primary vehicles for innocent parties to obtain their release have been Motions to Vacate pursuant to 28 U.S.C. § 2255, which arguably can only be filed within a year of the *Simmons* decision.[10] Without guidance to the contrary, it is likely the government will challenge all post-August 17, 2012 claims for *Simmons* relief regardless of the circumstances.

This is not how the Department should operate, and it is not how the Department claims to operate. United States Attorney Anne Tompkins of the Western District of North Carolina said, "[We are] looking diligently for ways, within the confines of the law, to recommend relief for defendants who are legally innocent."[11] We certainly hope that is the case, but, as noted above, the facts on the ground are far more ambiguous.

Each of the challenges we have outlined call for prompt guidance from the Department. Though the challenges already are weighing heavily on overburdened institutions, the collaborative response to implement the retroactive impact of the Fair Sentencing Act of 2010 provides a model upon which to build. In the *Simmons* context, this model must include the following features:

---

[9] Heath, *supra* n.1.

[10] There are strong arguments that an August 17, 2012, deadline is not applicable under these facts. For example, in *Farmer v. United States*, 2012 WL 1119920 at *16, Judge Boyle rejected the claim that Farmer had waived his appeal or that it was time barred. Judge Boyle instead held that equitable tolling applied and Farmer's action was timely as he "filed his section 2255 petition within a reasonable period after the *Simmons* en banc decision." *Id.* at 16. The government opposed Farmer's section 2255 petition, and, subsequent to Judge Boyle's order, moved for reconsideration. *Id.* at 1. In another example of its posture, the government typically files such motions for reconsideration whenever a district court grants relief pursuant to *Simmons*. *Id.*; *See, e.g.*, *Taylor v. United States*, No. 5:12-cv-00033-BO (E.D.N.C. April 27, 2012); *Woodard v. United States*, No. 5:12-cv-00106-BO (E.D.N.C. April 27, 2012, July 2, 2012); *Yarborough v. United States*, No. 5:11-cv-00568-F (E.D.N.C. May 15, 2012).

[11] Heath, supra n.1.

1) The government should identify all inmates potentially eligible for relief by:
    a. compiling and making public a comprehensive list of all individuals whose convictions or sentences are potentially impacted by *Simmons*; and
    b. notifying all individuals whose convictions or sentences are potentially impacted by *Simmons* of this fact as well as the legal resources available to them.
2) The government should proactively work toward appropriate relief for inmates who are actually innocent by:
    a. filing motions to dismiss the indictment for all inmates who, under *Simmons*, were wrongly convicted of felon-in-possession crimes;[12]
    b. agreeing that section 2255 motions are an appropriate vehicle for relief for inmates actually innocent subsequent to *Simmons*, even for inmates whose convictions became final more than a year before *Simmons* was decided; and
    c. waiving all defenses and procedural bars to post-conviction relief in *Simmons* cases involving felon-in-possession crimes. These defenses include, but are not limited to, procedural defaults, appeal waivers, and statutes of limitations.
3) The government should also work toward appropriate relief for inmates whose sentences are unjust by:
    a. supporting post-conviction relief and waiving defenses in these cases, just as it does for inmates who are actually innocent;
    b. making a particular effort to identify and support relief for inmates who unjustly received mandatory minimum or "career offender" sentences;
    c. ensuring that the government does not unduly withhold other relief, such as relief for substantial assistance or the retroactive application of the new crack-cocaine guidelines, for any inmate who obtains post-conviction sentencing relief under *Simmons*; and
    d. agreeing to expeditious re-sentencing hearings.

If comprehensive guidance along these lines is not possible by August 17, 2012, then the Department should provide preliminary guidance prior to this date instructing the North Carolina U.S. Attorney's Offices not to oppose *Simmons* relief until final guidance is promulgated. In any event, the ACLU requests timely and proactive steps to comply with the Fourth Circuit's ruling in *Simmons* and at least a preliminary response by August 14, 2012. It is our understanding from conversations with the federal defense bar that the Department is already weighing guidance. Accordingly, the proposed rapid response is not unrealistic.

Innocent people like Terrell McCullum should not be incarcerated. The guilty should serve sentences compatible with their crimes. The government has a responsibility to meet these minimal standards but has failed to do so in the past 11 months. The Department must act now.

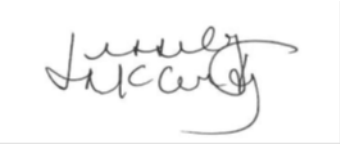
[12] Under Fourth Circuit precedent, the government can move to dismiss indictments even for inmates serving sentences for convictions that have long since become final. *See* Fed. R. Crim. P. 48; *Rice v. Rivera*, 617 F.3d 802, 809-10 (4th Cir. 2010).

Thank you for your attention to this matter. If there are any comments or questions, please feel free to contact Christopher Brook, Legal Director, ACLU of North Carolina Legal Foundation at (919) 834-3466 or cbrook@acluofnc.org or Jesselyn McCurdy, ACLU Senior Legislative Counsel at (202) 675-2307 or jmccurdy@dcaclu.org.

Respectfully submitted,

Laura W. Murphy
Director
Washington Legislative Office

Christopher A. Brook
Legal Director
ACLU of North Carolina Legal Foundation



Jesselyn McCurdy
Senior Legislative Counsel
Washington Legislative Office

Ezekiel Edwards
Director
Criminal Law Reform Project

cc: Lanny A. Breuer, Assistant Attorney General, Criminal Division
Jonathan J. Wroblewski, Policy and Legislation Director, Criminal Division
Anne Tompkins, U.S. Attorney for Western District of North Carolina
Ripley Rand, U.S. Attorney for Middle District of North Carolina
Thomas Walker, U.S. Attorney for Eastern District of North Carolina